Supreme Court, U.S.
FILED
DEC 17 1992
OFFICE OF THE CLERK

No. 92-880

In The

Supreme Court of the United States

October Term, 1992

KAI DAVID MIDBOE, Secretary of the Louisiana Department of Environmental Quality,

Petitioner,

versus

CHEMICAL WASTE MANAGEMENT, INC.,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

GERALD L. WALTER, JR.
Counsel of Record
ANNE J. CROCHET
SCHWAB & WALTER
10636 Linkwood Court
Baton Rouge, LA 70810
Telephone: (504) 767-1460
Attorneys for Respondent

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTIONS PRESENTED FOR REVIEW

I. Is hazardous waste, which would be considered an object of commerce when it is generated in the United States, not an object of commerce when it is generated in a foreign country?

II. Are La.R.S. 2190 and 2191 violative of the Interstate and Foreign Commerce Clauses of the U.S. Constitution?

III. Has Congress authorized the State of Louisiana to prohibit the importation of foreign generated hazardous waste for treatment, storage and disposal in a manner which, absent such authorization, would be violative of the Interstate and Foreign Commerce Clauses?

IV. Should this Court review whether the Executive Agreement between the United States and Mexico prevails over the Louisiana statutes, when the issue was not passed upon by the Trial Court or Court of Appeals?

V. If the Executive Agreement is subject to review, are La.R.S. 2190 and 2191 violative of the Supremacy Clause of the United States Constitution therefore constituting an additional ground for affirmance of the decisions of the Trial Court and Court of Appeals?

LIST OF ALL PARTIES

Kai David Midboe, Secretary of the Louisiana Department of Environmental Quality	Petitioner
Chemical Waste Management, Inc.	Respondent
Waste Management, Inc.	Parent corporation of Respondent, Chemical Waste Management, Inc.
The Brand Companies:	Nonwholly owned subsidiary of Respondent, Chemical Waste Management, Inc.
Brand Environmental Services, Inc.	
Brand Scaffold Services, Inc.	
Olshan Demolishing Company, Inc.	
Brand Industrial Services, Inc.	
Brand Marine/Utility Services, Inc.	

TABLE OF CONTENTS

Page

Questions Presented for Review i

Table of Authorities v

Constitutional Provisions and Statutes Involved 1

Statement of the Case 1

A. Proceedings and Disposition Below 1

B. Facts of the Case 2

1. The Chemical Waste Management Facility is Authorized to Treat, Store and Dispose of Hazardous Waste 2

2. The Foreign Hazardous Wastes which Chemical Waste Proposes to Receive are the Inland and Trico Wastes 2

3. The Inland and Trico Wastes are Subject to an Agreement Between the United States of America and Mexico 3

4. The Trico Waste is a Paint Stripper Waste .. 3

5. The Inland Waste is a Paint Overspray Waste 4

6. The Trico and Inland Wastes will Travel from Mexico, to Texas, and then to Louisiana 5

7. The Chemical Waste Facility's Waste Analysis Plan Complies with the Regulations and is Appropriate for the Analysis of Hazardous Wastes Generated by U.S. Companies and Hazardous Wastes Generated by Foreign Companies 6

TABLE OF CONTENTS – Continued

Page

8. The toxicological effects of the Mexican paint waste are no different from the toxicological effects of U.S. paint waste 7

9. The Attorney General of the State of Louisiana certified to USEPA that the Louisiana statutes do not ban foreign waste which travels to Louisiana from another state... 7

Summary of the Argument 8

Argument 11

I. Hazardous waste generated in a foreign nation transported into and treated, stored or disposed of in the United States is an "object of commerce" for the purposes of the Commerce Clause of the United States Constitution..... 11

II. The Louisiana statutes are violative of the Commerce Clause under the well-established tests enunciated by this Court..... 14

III. Congress has not, pursuant to the Resource Conservation and Recovery Act, authorized the State of Louisiana to engage in regulation of foreign and interstate commerce which would otherwise be forbidden by the Commerce Clause of the U.S. Constitution 19

IV. The Executive Agreement between the United States and Mexico additionally causes the Louisiana statutes to be unconstitutional under Art. VI, cl. 2 of the U.S. Constitution..... 22

Conclusion 28

TABLE OF AUTHORITIES

Page

CASES:

Asakura v. Seattle, 265 U.S. 332, 44 S.Ct. 515, 68 L.Ed. 1041 (1924) 26

Chemical Waste Management, Inc. v. Hunt, ___ U.S. ___, 112 S.Ct. 2009, 119 L.Ed.2d 121 (1992) .... *passim*

Chevron U.S.A., Inc. v. Natural Resources Defense Council, 467 U.S. 837, 104 S.Ct. 2778, 81 L.Ed.2d 694 (1984) 22

City of Philadelphia v. New Jersey, 437 U.S. 617, 98 S.Ct. 2531, 57 L.Ed.2d 475 (1978). 9, 12, 13, 15, 17, 18

Cook v. United States, 288 U.S. 102, 53 S.Ct. 305, 77 L.Ed. 641 (1933) 25

Dames and Moore v. Regan, 453 U.S. 654, 101 S.Ct. 2922, 69 L.Ed.2d 918 (1981) 24

Fort Gratiot Sanitary Landfill, Inc. v. Michigan Dept. of Natural Resources, ___ U.S. ___, 112 S.Ct. 2019, 119 L.Ed.2d 139 (1992) 13

Foster & Elam v. Neilson, 27 U.S. 253, 7 L.Ed. 415 (1829) 23

Hauenstein v. Lynham, 100 U.S. (10 Otto) 483, 25 L.Ed. 628 (1879) 23

Hazardous Waste Treatment Council v. State of South Carolina, 945 F.2d 781 (4th Cir. 1991) ... 10, 20, 21, 22

Healy v. Beer Institute, Inc., 491 U.S. 324, 109 S.Ct. 2491, 105 L.Ed.2d 275 (1989) 8

Hughes v. Oklahoma, 441 U.S. 322, 99 S.Ct. 1727, 60 L.Ed.2d 250 (1979) 15, 16, 17

Islamic Republic of Iran v. The Boeing Company, 771 F.2d 1279 (9th Cir. 1985); *cert. dismissed*, 479 U.S. 957, 107 S.Ct. 450, 93 L.Ed.2d 397 (1986) 25

TABLE OF AUTHORITIES – Continued

Page

Japan Line, Ltd. v. County of Los Angeles, 441 U.S. 434, 99 S.Ct. 1813, 60 L.Ed.2d 336 (1979) 10, 18

Lewis v. BT Investment Managers, Inc., 447 U.S. 27, 100 S.Ct. 2009, 64 L.Ed.2d 702 (1980) 8

Maine v. Taylor, 477 U.S. 131, 106 S.Ct. 2440, 91 L.Ed.2d 110 (1986) 10, 15, 17, 18, 19, 20

Martin v. Hunter's Lessee, 14 U.S. 304, 4 L.Ed. 97 (1816) 23

Missouri v. Holland, 252 U.S. 416, 40 S.Ct. 382, 64 L.Ed. 641 (1920) 11, 23

Prudential Insurance Co. v. Benjamin, 328 U.S. 408, 66 S.Ct. 1142, 90 L.Ed. 1342 (1946) 21

Reid v. Covert, 354 U.S. 1, 77 S.Ct. 1222, 1 L.Ed.2d 1148 (1957) 27

South-Central Timber Dev., Inc. v. Wunnicke, 467 U.S. 82, 104 S.Ct. 2237, 81 L.Ed.2d 71 (1984) 9, 10, 18, 19, 20

United States v. Belmont, 301 U.S. 324, 57 S.Ct. 758, 81 L.Ed. 1134 (1937) 23, 24

United States v. Guy W. Capps, Inc., 204 F.2d 655 (4th Cir. 1953), *aff'd on other grounds*, 348 U.S. 296, 75 S.Ct. 326, 99 L.Ed. 329 (1955) 24

United States v. County of Arlington, 669 F.2d 925; *cert. denied* 459 U.S. 801, 103 S.Ct. 23, 74 L.Ed.2d 39 (4th Cir. 1982) 23

TABLE OF AUTHORITIES – Continued

Page

United States v. Pink, 315 U.S. 203, 62 S.Ct. 552, 86 L.Ed. 796 (1942) 24

Weinberger v. Rossi, 456 U.S. 25, 102 S.Ct. 1510, 71 L.Ed.2d 715 (1982) 24

Whitney v. Robertson, 124 U.S. 190, 8 S.Ct. 456, 31 L.Ed. 386 (1988) 27

Wood v. Strickland, 420 U.S. 308, 95 S.Ct. 992, 43 L.Ed.2d 214 (1975) 11, 23

U.S. CONSTITUTION:

U.S. Const. Art. I, § 8, cl. 3 ..... 1, 8

U.S. Const. Art. VI, cl. 2 ..... 11, 22, 23

FEDERAL STATUTES AND REGULATIONS:

15 USC § 2612 (West 1982 & Supp. 1992) 24

19 USC § 66 (West 1978) 24

19 USC § 1202, Schedule 7, Part 13 No. 793.00 (West 1978) 24, 25

19 USC § 1351 (West 1980 & Supp. 1992) 24

19 USC § 1448 (West 1980) 24

19 USC § 1624 (West 1980) 24

42 USC §§ 6901-92k (West 1983 & Supp. 1992) 2, 10

42 USC §§ 6921-24 (West 1983 & Supp. 1992) 24

42 USC § 6926 (West 1983 & Supp. 1992) 1, 20

42 USC § 6929 (West Supp. 1992) 1, 20

TABLE OF AUTHORITIES – Continued

Page

42 USC § 6938 (West S[illegible]1992) 24

40 CFR § 262.10(c) (1991) 16

40 CFR § 262.60 (1991) 16, 25, 26

40 CFR § 271.4 (1991) 8

40 CFR § 271.7 (1991) 7

LOUISIANA STATUTES AND REGULATIONS:

La.R.S. 30:2190 (West 1989) ..... *passim*

La.R.S. 30:2191 (West 1989) ..... *passim*

LAC 33:V.1101.B 16

LAC 33:V.1519 16

LAC 33:V.1527 16

OTHER AUTHORITIES:

The Agreement Between the United States of America and the United Mexican States on Cooperation for the Protection and Improvement of the Environment in the Border Area, August 14, 1983, United States – Mexico, T.I.A.S. No. 10827; Agreement on Protection of the Environment in the Border Area, January 29, 1987, United States – Mexico, Annex III, 26 I.L.M. 25 1

Restatement (Third) of the Foreign Relations Law of the United States, Section 115, reporter's note 5 24

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

1. U.S. Const. Art. I, § 8, cl. 3:
   [THE CONGRESS SHALL HAVE POWER] [t]o regulate commerce with foreign Nations, and among the several States, and with the Indian tribes. (First bracketed portion from U.S. Const. art. I, § 8, cl. 1.)
2. La.R.S. 30:2190 (West 1989).
3. La.R.S. 30:2191 (West 1989).
4. 42 USC § 6926 (West 1983 & Supp. 1992).
5. 42 USC § 6929 (West Supp. 1992).
6. The Agreement Between the United States of America and the United Mexican States on Cooperation for the Protection and Improvement of the Environment in the Border Area, August 14, 1983, United States – Mexico, T.I.A.S. No. 10827; Agreement on Protection of the Environment in the Border Area, January 29, 1987, United States – Mexico, Annex III, 26 I.L.M. 25.

STATEMENT OF THE CASE

A. Proceedings and Disposition Below:

As was adequately stated by Petitioner, the Court of Appeals concluded that La.R.S. 30:2190 and 2191 are unconstitutional under both the Interstate and Foreign Commerce Clauses. However, it should be noted that the Court of Appeals found additionally that the State of Louisiana failed to present any evidence which indicated an unmistakably clear intent on the part of Congress to permit Louisiana to otherwise impermissibly burden interstate commerce. The Court further found, contrary to

Petitioner's assertions, that RCRA[1] could be read to *prohibit* state hazardous waste legislation that burdens interstate commerce.

B. Facts of the Case:

1. The Chemical Waste Management Facility is Authorized to Treat, Store and Dispose of Hazardous Waste

Chemical Waste Management, Inc. ("Chemical Waste") is authorized to conduct treatment, storage, and disposal operations and related activities at a hazardous waste treatment, storage and disposal facility it owns and operates in Carlyss, Louisiana.[2]

2. The Foreign Hazardous Wastes which Chemical Waste Proposes to Receive are the Inland and Trico Wastes

Inland and Trico are "Maquiladoras" or Mexican companies incorporated pursuant to the Mexican corporate law that may be 100% foreign owned and 100% foreign managed and which are set up in Mexico for the purpose of carrying out industrial operations in Mexico pursuant to the "Decree for the Development and Operation of the Maquiladoras Industry for Exportation".[3] Under the Maquiladora program, the Mexican government does not impose duties upon components, machinery, equipment, tools, raw materials or spare parts imported by a Maquiladora into Mexico on a temporary

---

[1] Resource Conservation and Recovery Act of 1976, as amended, 42 USC §§ 6901-6992.

[2] Stipulation No. 1, R. 292.

[3] Stipulation No. 17, R. 297.

basis in connection with its industrial operations (e.g., assembly or production), as long as the goods assembled or manufactured from these operations are exported from Mexico and the hazardous waste generated from production are exported back to the country from which the materials originated.[4]

3. The Inland and Trico Wastes are Subject to an Agreement Between the United States of America and Mexico

The hazardous wastes noticed by Chemical Waste to be received from Inland and Trico are wastes subject to Article XI of Annex III to the "Agreement Between the United States of America and the United Mexican States on Cooperation for the Protection and Improvement of the Environment in the Border Area" dated August 14, 1983 ("U.S.-Mexico Agreement").[5] Both wastes are generated in the process of economic production, manufacturing, processing or repair, for which raw materials are utilized and temporarily admitted into Mexico.[6]

4. The Trico Waste is a Paint Stripper Waste

Trico has a U.S. plant which collects raw materials and ships the raw materials to its Mexican plant which produces automobile windshield wipers.[7] Approximately 90% of the Ford automobiles found on U.S. car lots have windshield wipers that were produced at the Trico plant

---

[4] *Transcript* 105-107, Vol. 2.

[5] Stipulation Nos. 11, 23, 24; Stipulation Exhibit 9; R. 154-155, 158-159, 173-191.

[6] Stipulation Nos. 23 and 24; R. 158-159.

[7] *Transcript* 48, Vol. 1.

in Mexico.[8] The windshield wipers are painted at the Mexican plant and waste results from the painting process. Specifically, the wiper blades are hung on large frames and the frames are moved through painting booths and are painted automatically. Eventually, the frames become coated with overspray paint and are taken out of service. A paint stripper (Kolene No. 5) is used to strip the overspray paint from the frame. When the paint stripper is no longer effective, it is placed into drums as a waste and shipped to the United States for disposal.[9]

Trico has a sister plant in Buffalo, New York which is identical to the plant in Matamoros, Mexico. The specifications for the paint used in Trico's New York plant are identical to the paint used in Trico's Matamoros plant. The waste generated from each operation is identical.[10]

Further, the paint stripper, Kolene No. 5, is utilized in paint stripping operations across the United States. The Chemical Waste facility in Louisiana has received and managed paint stripper waste (including Kolene No. 5) from U.S. generators.[11]

5. The Inland Waste is a Paint Overspray Waste

General Motors ("GM") or Inland has a Mexican plant which makes interior automotive parts, including dashboards. Inland's Mexican plant produces 60% of the dashboards on GM cars.[12] The Mexican plant accepts raw

---

[8] *Transcript* 48-49, Vol. 1.

[9] *Transcript* 49-50, Vol. 1; 24, Vol. 2.

[10] *Transcript* 50-53, 61, 108-109, Vol. 1.

[11] *Transcript* 50-51, 130, Vol. 1.

[12] *Transcript* 51, Vol. 1.

materials, i.e. GM paint and the material to be painted, from the United States. At the Inland Mexican plant, sheets of vinyl are moved through painting booths. Overspray from the painting process accumulates on cardboard; this is the waste to be disposed of.[13]

GM has identical painting booths at facilities located in Louisiana and Texas. The specifications of the paint used in Inland's Mexican plant are identical to the paint used in Inland's U.S. plants. The waste produced from the Inland Mexican plant is identical to waste produced from the U.S. plants. The only material which is different is the makeup water. The Mexican plant utilizes robotic equipment which requires purer water than is required in the United States plant. The Chemical Waste facility in Louisiana has received and managed paint overspray waste from other GM plants in the United States.[14]

In addition to the Trico and Inland plants, there are other Maquiladora plants in Mexico which have identical plants in the United States. The processes employed in the Mexican plants are similar to or identical with those utilized in the U.S. plants. Competitors of Chemical Waste receive and manage Maquiladora waste at U.S. facilities. The waste is managed in at least four states: Oklahoma, Utah, California, and Colorado.[15]

6. The Trico and Inland Wastes will Travel from Mexico, to Texas, and then to Louisiana

It is proposed that the Trico and Inland wastes will be shipped from their respective facilities in Mexico to

---

[13] *Transcript* 51-53, Vol. 1.

[14] *Transcript* 53-54, 108-109, 131, Vol. 1.

[15] *Transcript* 54-57, 62-64, Vol. 1.

facilities located in Texas where they will be temporarily stored. The wastes will then be transported from Texas to Louisiana for treatment and disposal.[16]

7. The Chemical Waste Facility's Waste Analysis Plan Complies with the Regulations and is Appropriate for the Analysis of Hazardous Wastes Generated by U.S. Companies and Hazardous Wastes Generated by Foreign Companies

The Chemical Waste facility's procedures for managing waste are set forth in the facility's "Waste Analysis Plan".[17] The facility's Waste Analysis Plan and procedures for receiving and monitoring of incoming waste comply with all applicable federal and state environmental regulations and even exceed the federal and state regulatory requirements.[18]

The facility's Waste Analysis Plan is adequate for the facility to make proper treatment, storage and disposal decisions regarding wastes received from domestic or foreign generators.[19] The Plan does not provide any different provisions for foreign waste nor is there any technical basis or reason for the Plan to provide any different or special procedures.[20] Accordingly, no different or additional procedures are necessary for the proper treatment,

---

[16] Stipulation Nos. 23 and 24, R. 158-159, *Transcript* 7-9, Vol. 3.

[17] Pl. Ex. 1; *Transcript* 42, 47, 116, 120, 160-161, Vol. 1.

[18] *Transcript* 47, 160-161, Vol. 1.

[19] *Transcript* 126, 131, 161, Vol. 1.

[20] *Transcript* 131, 163, Vol. 1.

storage or disposal of the Inland and Trico wastestreams at the Carlyss facility.[21]

8. The toxicological effects of the Mexican paint waste are no different from the toxicological effects of U.S. paint waste.

The location and operation of the facility, whether managing foreign *or* domestic hazardous waste, do not present any threats to human health or the environment. The Inland and Trico wastes, if handled at the Carlyss facility, would present no threat to human health or the environment. The toxicological effects of the Mexican paint waste are no different than the toxicological effects of U.S. paint waste.[22]

9. The Attorney General of the State of Louisiana certified to USEPA that the Louisiana statutes do not ban foreign waste which travels to Louisiana from another state.

The State of Louisiana received authorization to administer and enforce certain portions of RCRA in 1985.[23] Prior to Louisiana receiving its authorization, the State's Attorney General, pursuant to 40 CFR § 271.7, submitted a certification to EPA, Region 6, regarding the laws of Louisiana, wherein he acknowledged EPA's concern that the Louisiana statutes, "if interpreted to apply to waste generated outside of the United States, but to or through Louisiana from neighboring states, . . . would fail to satisfy the consistency requirement of 40 CFR Section

---

[21] *Transcript* 32-33, 126-127, 131, Vol. 1; Pl. Ex. 2-6.

[22] *Transcript* 27, 60, 62, 65, Vol. 2.

[23] Stipulation No. 21, R. 157.

271.4"; and advised EPA that the prohibition contained in the Louisiana statutes, as amended in 1984, "applies only to waste imported directly to Louisiana from outside the United States" and is not inconsistent with the federal program.[24] Notwithstanding the certification of the Attorney General, the Secretary of the Louisiana Department of Environmental Quality interprets La.R.S. 30:2190 and 2191 as being applicable to hazardous waste generated from a foreign source whether it comes directly into Louisiana through a coastal port or whether it passes through other states in transit.[25]

SUMMARY OF THE ARGUMENT

The Commerce Clause of the United States Constitution grants to Congress the power and authority to regulate both interstate and foreign commerce. U.S. Const. Art. I, § 8, cl. 3. Even where the Congress has failed to pass legislation to regulate interstate or foreign commerce, the states are limited in their ability to discriminate or place barriers against interstate and foreign commerce.[26]

Hazardous waste is an object of commerce and subject to the protection of the Commerce Clause. *Chemical Waste Management, Inc. v. Hunt*, ___ U.S. ___, 112 S.Ct.

---

[24] Stipulation No. 12, R. 155; Stipulation Ex. 11, R. 200.

[25] State's answer, para. XXXX, R. 38.

[26] *Healy v. Beer Institute, Inc.*, 491 U.S. 324, 325 n.1, 109 S.Ct. 2491, 2493 n.1, 105 L.Ed.2d 275 (1989); *Lewis v. BT Investment Managers, Inc.*, 447 U.S. 27, 35-36, 100 S.Ct. 2009, 2015, 64 L.Ed.2d 702 (1980).

2009, 119 L.Ed.2d 121 (1992). Thus, the Inland and Trico hazardous wastes are objects of commerce subject to the protection of the Commerce Clause.

The Louisiana statutes are violative of the Interstate and Foreign Commerce Clauses because they restrict, *without exception*, the movement, treatment, storage, and disposal of foreign hazardous waste in Louisiana.

Louisiana's prohibition against foreign generated hazardous waste is impermissible under the *Interstate Commerce Clause* because the prohibition is based solely on the *origin* of the hazardous waste. *Chemical Waste Management, Inc. v. Hunt, supra; City of Philadelphia v. New Jersey*, 437 U.S. 617, 98 S.Ct. 2531, 57 L.Ed.2d 475 (1978). The record establishes that, aside from *origin*, there is no difference between the subject Mexican waste and waste generated in the United States. While the statutes can be interpreted to only restrict foreign hazardous waste imported into Louisiana directly from a foreign nation, the evidence shows that the effect of the statute is, nevertheless, to restrict the flow of commerce from one state, Texas, to another state, Louisiana.

Likewise, La.R.S. 30:2190 and 30:2191 violate the *Foreign Commerce Clause* because the prohibition is based solely on the origin of the waste. When foreign commerce is restrained, a higher level of scrutiny is required because, unlike interstate commerce, the United States must speak with a single voice for effective relations and trade with foreign nations. *South-Central Timber Dev., Inc. v. Wunnicke*, 467 U.S. 82, 104 S.Ct. 2237, 81 L.Ed.2d 71 (1984). Although Congress' regulatory power over interstate commerce may be limited by federalism and state sovereignty, this Court has not held that such limitations

apply to the Congress' power to regulate foreign commerce. *Japan Line, Ltd. v. County of Los Angeles*, 441 U.S. 434, 99 S.Ct. 1813, 60 L.Ed.2d 336 (1979). The Louisiana restrictions placed on the importation of foreign-generated hazardous waste, based solely on its origin, violate the Foreign Commerce Clause of the United States Constitution.

While Congress may authorize the states to engage in practices otherwise unconstitutional under the Commerce Clause, *Maine v. Taylor*, 477 U.S. 131, 106 S.Ct. 2440, 91 L.Ed.2d 110 (1986), such congressional authorization must be "unmistakably clear" and must contain "a clear expression of approval by Congress". *South-Central Timber Development, Inc. v. Wunnicke*, 467 U.S. 82 at 91-92, 104 S.Ct. 2237 at 2242-2243.

The Resource Conservation and Recovery Act of 1976 ("RCRA"), as amended, 42 USC §§ 6901-92k, which establishes a national program for hazardous waste management administered by the Environmental Protection Agency ("EPA"), contains no clear statement or any indication of congressional intent to permit states to override the Constitution and, therefore, does not authorize the State of Louisiana to prohibit the importation of foreign-generated hazardous waste for treatment, storage or disposal. *Hazardous Waste Treatment Council v. State of South Carolina*, 945 F.2d 781 (4th Cir. 1991). Hence, while Louisiana's hazardous waste program has been authorized by EPA pursuant to rules promulgated under the RCRA scheme, EPA's approval of the state program does not constitute a declaration that the State's program is constitutional or that such approval is binding on the

courts. Nor does it constitute a congressional authorization for Louisiana to override the constitution. Without such congressional authorization, the Louisiana statutes violate the Commerce Clause.

Because neither the Trial Court nor the Appellate Court passed upon the Supremacy Clause issue, Chemical Waste respectfully submits that this Court should not grant certiorari to render a decision on this issue. *Wood v. Strickland*, 420 U.S. 308, 95 S.Ct. 992, 43 L.Ed.2d 214 (1975). However, if this issue is reviewed, the record demonstrates that the Louisiana statutes violate the Supremacy Clause: an additional ground for affirming the Court of Appeals' decision. Particularly, the statutes conflict with the U.S.-Mexico Agreement which requires that hazardous waste generated by Maquiladoras must be readmitted by the country of origin of the raw materials which were utilized in the production of the goods. The Agreement is the supreme law of the land and cannot be subjected to limitation by any state. U.S. Const. Art. VI, cl. 2; *Missouri v. Holland*, 252 U.S. 416, 40 S.Ct. 382, 64 L.Ed. 641 (1920). Because the statutes prohibit the receipt of the Inland and Trico wastes in direct contravention of the Agreement, they are unconstitutional.

Chemical Waste respectfully submits that Petitioner's request for a writ of certiorari should be denied because the lower courts' decisions are correct and consistent with Supreme Court authorities.

ARGUMENT

I. Hazardous waste generated in a foreign nation transported into and treated, stored or disposed of in the United States is an "object of commerce" for the purposes of the Commerce Clause of the United States Constitution.

This Court has concluded that hazardous waste is an article of commerce and is entitled to the protection of the

Commerce Clause. *Chemical Waste Management, Inc. v. Hunt*, 112 S.Ct. 2009 at 2012 n. 3.

Because this Court addressed hazardous waste generated in the United States as opposed to waste generated in a foreign country, Petitioner asserts that this Court's conclusion that hazardous waste is an object of commerce may not extend to foreign generated and foreign regulated hazardous waste.[27] However, Petitioner fails to explain why the location of the waste's generation would act to disqualify it as an object of commerce.

Additionally, Petitioner seeks to utilize the reasoning of the quarantine cases to support its assertion that foreign generated waste is not a subject of commerce. However, the rationale of these "quarantine cases" is inapplicable to the issue raised by Petitioner. The quarantine cases cited by Petitioner upheld laws which prevented traffic in noxious articles *whatever their origin* not laws which disqualified items as objects of commerce on the basis of origin. *City of Philadelphia v. New Jersey*, 437 U.S. at 629, 98 S.Ct. at 2538 (1978). The Louisiana statutes bar the treatment, storage, and disposal of the foreign generated waste on the sole basis of the origin of the waste.

Further, there is no reason to exclude hazardous waste generated in a foreign country as an object of

---

[27] Petitioner's assertion is puzzling since in his original brief to the Fifth Circuit at pp. 12-14, Petitioner apparently conceded that foreign generated hazardous waste is an "object of commerce."

commerce. This Court set forth its rationale for determining whether an item constitutes an object of commerce in the case of *City of Philadelphia v. New Jersey*, 437 U.S. at 622, 98 S.Ct. at 2534 (1978): all objects of interstate trade merit Commerce Clause protection; however, certain items may be removed from such protection where the dangers inherent in the item's very movement *far outweighed* the article's worth in interstate commerce. Regarding hazardous waste in particular, this court recently found that domestic hazardous waste constitutes an object of commerce. *Chemical Waste Management, Inc. v. Hunt*, 112 S.Ct. at 2012 n. 3. Citing *Fort Gratiot Sanitary Landfill v. Michigan Dept. of Natural Resources*,[28] this Court explained:

> "Whether the business arrangements between out-of-state generators of hazardous waste and the Alabama operator of a hazardous waste landfill are viewed as 'sales' of hazardous waste or 'purchases' of transportation and disposal services, *the commercial transactions unquestionably have an interstate character.* The Commerce Clause thus imposes some constraints on [Alabama's] ability to regulate these transactions." (emphasis added)

Petitioner has not demonstrated why this same rationale should not apply to foreign hazardous waste. The origin of the hazardous waste is not determinative of whether the item is an object of commerce. Origin is not a basis upon which to disqualify an item as an object of commerce just as it is not a basis upon which to discriminate against commerce.

---

[28] *Fort Gratiot Sanitary Landfill, Inc. v. Michigan Dept. of Natural Resources*, 112 S.Ct. 2019, 119 L.Ed.2d 139 (1992).

II. The Louisiana statutes are violative of the Commerce Clause under the well-established tests enunciated by this Court.

The Louisiana statutes discriminate against commerce on their face because they establish different standards for domestic commerce and foreign commerce. The statutes absolutely prohibit the introduction or receipt of any waste generated in foreign nations into Louisiana for the purpose of treatment, storage or disposal. They also have the effect of prohibiting the importation of foreign waste even when the foreign waste travels through another state *en route* to the State of Louisiana.[29] Although the Louisiana statutes pronounce that the laws of foreign nations are inadequate to insure that hazardous wastes sought to be exported to the United States do not contain unknown or unauthorized pollutants and that such wastes are not released into the environment, no less discriminatory alternatives are provided for. La.R.S. 30:2190.A.(2). In short, the prohibition against foreign waste is a blanket prohibition.

Because the statutes are overtly discriminatory, the Secretary had the burden to justify the ban both in terms of the local benefits flowing from the statutes and the

---

[29] The Secretary has interpreted the subject statutes as prohibiting the receipt and handling of hazardous waste generated from a foreign source, whether it passes through other states in transit and/or whether it comes in Louisiana through a coastal port notwithstanding La.R.S. 30:2190.D. which provides "This Section shall only apply to hazardous waste which is imported into this state directly from a foreign nation." and the certification of Attorney General Guste. (See Stipulation No. 12, R. 155; Pl. Answer, Para. XXXX, R. 38).

unavailability of nondiscriminatory alternatives adequate to preserve the local interests at stake. *Chemical Waste Management, Inc. v. Hunt*, 112 S.Ct. at 2014. "At a minimum, such facial discrimination involves the strictest scrutiny of any purported legitimate local purpose and of the absence of nondiscriminatory alternatives." *Id.* citing *Hughes v. Oklahoma*, 441 U.S. 322, 337, 99 S.Ct. 1727, 1737, 60 L.Ed.2d 250 (1979).

This same two pronged *Hughes* test was applied in *Maine v. Taylor*, 477 U.S. 131, 106 S.Ct. 2440, 91 L.Ed.2d 110 (1986), the decision relied upon by Petitioner. *Taylor* involved a Maine statute that banned the importation of out-of-state baitfish. This Court measured the constitutionality of the statute under the strict scrutiny standard applicable to laws that discriminate against interstate commerce on their face. It found the first prong was satisfied only because Maine had "legitimate reasons, 'apart from their origin, to treat [out-of-state baitfish] differently.' " 477 U.S. at 152 (*quoting, City of Philadelphia*, 437 U.S. at 627, 98 S.Ct. at 2537). Specifically, the out-of-state baitfish had a physical characteristic – the presence of parasites – that was "not common to wild fish in Maine." 477 U.S. at 141, 106 S.Ct. at 2448. The state proved through expert testimony that no measure short of a complete ban would allow it effectively to exclude fish with parasites; existing sampling and inspection procedures simply were not adequate. 477 U.S. at 146. The Court for that reason upheld the statute. Thus, *Maine v. Taylor, supra* rested squarely on the Court's determination that the record established that out-of-state baitfish were in fact different from and posed a substantially different threat to the environment than in-state baitfish. Here, by contrast, the record reflects – and the trial court found –

that foreign waste is not different from and does not pose a different threat than U.S. waste. Therefore, the Louisiana statutes bar the treatment, storage and disposal of the waste on the sole basis of its origin (i.e., that the waste is generated in a foreign country).

A foreign waste entering Louisiana is subject to the same regulations and controls as any other domestic waste brought into the State of Louisiana. Louisiana retains the power to monitor and regulate more closely the transportation of all hazardous wastes within its borders. *Chemical Waste Management, Inc. v. Hunt*, 112 S.Ct. at 2016. In the case of the Inland and Trico wastes, the waste will be transported through Texas and then transported into Louisiana. While in Texas, the waste is subject to the laws of Texas. There is no legitimate distinction between the Trico and Inland wastes and any other waste coming from Texas or any other state in the United States to Louisiana because the Louisiana hazardous waste regulations and the federal regulations apply to all.[30] Stated differently, waste from the Maquiladora companies which is transported to the United States must comply with the laws of the United States; and, therefore, no basis for distinguishment exists. Louisiana's prohibition of such waste can only rest on the origin of the waste. As such, the laws do not serve a "legitimate" purpose.

Likewise, the second prong of the *Hughes* test is not satisfied under the "reasoning of Maine." This Court in *Maine v. Taylor, supra*, did not dismiss the second prong of the *Hughes* test, but merely concluded that it had been

---

[30] 40 CFR § 262.60(a-c); 40 CFR § 262.10(c); LAC 33:V.1101.B; LAC 33:V.1527; LAC 33:V.1519; LAC 33:V, Chapter 13.

satisfied in that case. The State of Louisiana, however, has failed to present any evidence that a nondiscriminatory or less discriminatory alternative is unavailable. The statutes provide that hazardous waste generated outside the United States and its territories cannot, *under any circumstances*, be transported or received into Louisiana for the purpose of treatment, storage or disposal. The Louisiana statutes are not a "last ditch" attempt after nondiscriminatory alternatives have proved unfeasible. *See Hughes v. Oklahoma*, 441 U.S. at 338, 99 S.Ct. at 1737 (1979). Therefore, even assuming a legitimate public purpose, the *total and absolute* prohibition of foreign generated hazardous waste from Louisiana for treatment, storage or disposal is not the alternative which is least burdensome on foreign and interstate commerce. Hence, this Court should find as it has similarly found in *Chemical Waste Management, Inc. v. Hunt*, that *Maine v. Taylor* "provides no additional justification" for the Louisiana statutes.

While certain quarantine legislation enacted by states has not been considered to be forbidden protectionist measures even though the legislation was directed against out-of-state commerce, these quarantine laws did not discriminate against interstate commerce as such, but simply prevented traffic in noxious articles *whatever their origin*. *Chemical Waste Management v. Hunt*, 112 S.Ct. at 2017; *City of Philadelphia v. New Jersey*, 437 U.S. at 629. In *City of Philadelphia v. New Jersey*, the Court concluded that if waste from out-of-state is inherently harmful then so is waste from in-state. *Id.* at 629. In *Chemical Waste Management v. Hunt*, this Court found "there is absolutely no evidence before this Court that waste generated outside Alabama is more dangerous than waste generated in Alabama. *Id.* at 2015, and

held that the Commerce Clause prohibited Alabama from exacting a greater hazardous waste disposal tax for hazardous materials generated outside Alabama than it does for those generated in-state, despite the *Maine v. Taylor* decision and the quarantine cases.

Louisiana's ban is on the basis of origin and is no quarantine law. The Louisiana statutes in question are *per se* prohibitions against the importation of foreign waste. They forbid the transportation and receipt of all hazardous waste generated outside the United States and its territories into the State of Louisiana for the purposes of treatment, storage and disposal and thus "overtly block the flow of interstate [and foreign] commerce at [the] state's borders." *City of Philadelphia v. New Jersey*, 437 U.S. at 624, 98 S.Ct. at 2535. Such an express prohibition is expressly and clearly disallowed under the cases of *Chemical Waste Management v. Hunt, supra*, and *City of Philadelphia v. New Jersey, supra* especially where, as here, the state offered no alternative means which may be less discriminatory. Further, because foreign commerce is restrained, a higher level of scrutiny is required because, unlike interstate commerce, the United States must speak with a single voice for effective relations and trade with foreign nations. *South-Central Timber Dev., Inc. v. Wunnicke*, 467 U.S. at 96, 104 S.Ct. at 2245. Although Congress' regulatory power over interstate commerce may be limited by federalism and state sovereignty, this Court has not held that such limitations apply to the Congress' power to regulate foreign commerce. *Japan Line, Ltd. v. County of Los Angeles*, 441 U.S. at 448, 99 S.Ct. at 1821. Consistent with the well-established tests enunciated by this Court, the Court of Appeals correctly found the Louisiana statutes are violative of the Commerce Clause.

III. Congress has not, pursuant to the Resource Conservation and Recovery Act, authorized the State of Louisiana to engage in regulation of foreign and interstate commerce which would otherwise be forbidden by the Commerce Clause of the U.S. Constitution.

Petitioner contends that through RCRA, Congress has authorized the states to regulate hazardous waste free from the restraints of the Commerce Clause and therefore, La.R.S. 30:2190 and 2191 are not violative of the Commerce Clause. Petitioner's position is without merit because RCRA does not express a clear intention on the part of Congress to permit a state to engage in practices otherwise unconstitutional under the Commerce Clause.

Congress may permit the states to engage in practices burdening commerce which would otherwise be unconstitutional under the Commerce Clause. However, such authorization by Congress must contain "[a]n unambiguous indication of congressional intent", *Maine v. Taylor*, 106 S.Ct. at 2447, 477 U.S. at 139, must be "unmistakably clear," *South-Central Timber*, 476 U.S. at 96, 104 S.Ct. at 2242, and must contain "a clear expression of approval by Congress", *Id* at 2243.[31] Furthermore, this

---

[31] Although petitioner correctly cites language used by this Court in *South Central, supra*, namely that "an express statement of congressional policy prior to finding that state regulation is permissible" and that there is "no talismanic significance to expressly stated" (see Petition, p. 7), he omits the Court's statement of the true "test". This Court states, "There is no talismanic significance to the phrase 'expressly stated', however; it merely states one way of meeting the requirement that for a state regulation to be removed from the reach of the dormant

Court in *South-Central Timber* implied that such congressional authorization must be even more "clear" when foreign commerce is involved.[32]

The RCRA statutes presumably relied upon by the Secretary are 42 USC §§ 6926(d) and 6929. While these provisions set up a management scheme for hazardous waste programs, they certainly do not evince a clear and unambiguous intent on the part of Congress to authorize state regulation of the movement of hazardous waste in commerce, free from the restraint of the Commerce Clause. And, while a state may adopt more stringent requirements than the federal government pursuant to the regulatory scheme, such requirements must be applied nondiscriminately. Nowhere in RCRA does Congress authorize states to apply their regulations in a discriminatory manner for mere protectionist purposes.

The Court of Appeals' decision is in accord with the Federal Fourth Circuit Court of Appeals decision in *Hazardous Waste Treatment Council v. State of South Carolina*, 945 F.2d 781 (4th Cir. 1991), hereafter *"HWTC"*. Both decisions apply correctly the analysis set forth in *Maine v. Taylor, supra,* and *South-Central Timber, supra.* In *HWTC*, the District Court had enjoined a State from enforcing statutes prohibiting acceptance of hazardous waste from

---

Commerce Clause, *congressional intent must be unmistakably clear"* (emphasis added). *South Central Timber, supra* at p. 2242.

[32] "The need for affirmative approval is heightened by the fact that Alaska's policy has substantial ramifications beyond the nation's borders. The need for a consistent and coherent foreign policy, which is the exclusive responsibility of the Federal government, *enhances the necessity that congressional authorization not be lightly implied"*. *South Central Timber, supra* at p. 2243, Fn.7.

generators in other states where such disposal was banned. In determining whether HWTC would succeed on the merits, the Court specifically addressed the State's contention that RCRA embodied congressional authorization for the states to affect interstate commerce. In upholding the injunction, the court found that HWTC would succeed on its claim that the state statutes violated the Commerce Clause and concluded that *"RCRA appears to contain no clear statement or indication of legislative intent to permit states to override the Constitution. . . . RCRA and CERCLA § 104(c)(9) do not appear to evince congressional intent to redefine the Commerce Clause."* (emphasis added). 945 F.2d at 794-795.

It is significant that Congress enacted RCRA in 1976 prior to Louisiana's adoption of the statutes in question and there was no nationwide system of hazardous waste regulation in place at that time. Therefore, no congressional permission of state regulation of waste movement can be gleaned from the fact that the administrative agency, EPA, authorized Louisiana's hazardous waste program while the subject statutes were in force.[33]

In an apparent attempt to demonstrate such clear congressional intent, Petitioner repeatedly states that Congress

---

[33] *Compare and contrast Prudential Insurance Co. v. Benjamin*, 328 U.S. 408, 66 S.Ct. 1142, 90 L.Ed. 1342 (1946) where the court, in holding Congress removed commerce clause limitations on the authority of states to regulate and tax the business of insurance by passage of the McCarran Act, found that Congress "must have had full knowledge of the nationwide existence of state systems of regulation and taxation" and that the Act's "purpose was evidently to throw the whole weight of its power behind the state systems". 66 S.Ct. at 1155.

through RCRA has authorized/approved Louisiana's hazardous waste program which includes the statutes in question. Petitioner presumably implies that by this supposed "congressional" approval of the statutes in question, one finds the clear intent of Congress to authorize Louisiana to regulate hazardous waste in violation of the Commerce Clause. However, the EPA, a federal agency, and *not* Congress, authorized the state program in question. The "intent" of Congress might be gleaned from its enactment of certain RCRA provisions but may certainly not be evidenced from the acts of an independent agency! In deciding whether a federal statute removes Commerce Clause restraints from state action, this court must examine the wording of the statute, RCRA, and the Constitution; any contrary interpretation or application of the statute by the administrative agency, EPA, must be rejected. *HWTC, supra* at 794; *Chevron U.S.A., Inc. v. Natural Resources Defense Council*, 467 U.S. 837, 843, n. 9, 104 S.Ct. 2778, 2781-2782, no. 9, 81 L.Ed.2d 694 (1984).

Because there has been no clear unmistakable authorization by Congress, the Louisiana statutes in question are not removed from the Commerce Clause restrictions.

IV. The Executive Agreement between the United States and Mexico additionally causes the Louisiana statutes to be unconstitutional under art. VI, cl. 2 of the U.S. Constitution.

Neither the Trial Court nor the Court of Appeals found it was necessary to address the effect of the U.S.-Mexican Agreement which governs the handling of the wastes between the countries because they found the statutes violative of the Interstate and Foreign Commerce Clauses. Chemical Waste submits these conclusions are correct. As the lower courts have not passed upon the Executive Agreement issue,

this issue, if considered, should first be decided by the Court of Appeal, *Wood v. Strickland*, 420 U.S. 308, 95 S.Ct. 992, 1003, 43 L.Ed.2d 214 (1975), and therefore writs should not be granted.

Notwithstanding the foregoing, Chemical Waste respectfully submits that in addition to contravening the Commerce Clause, the subject statutes are unconstitutional pursuant to the Supremacy Clause, U.S. Const. Art. VI, cl. 2.

Treaties are proclaimed in the text of the Constitution to be the supreme law of the land and binding upon states. U.S. Const. Art. VI, cl. 2. Thus, treaties, being the supreme law of the nation, are equal in status to congressional legislation,[34] and are superior to the laws and constitutions of the individual states. *Hauenstein v. Lynham*, 100 U.S. (10 Otto) 483, 25 L.Ed. 628 (1879). Accordingly, when the provisions of state law conflict with the provisions of an international treaty, by virtue of the Supremacy Clause, the provisions of the treaty must prevail.[35] International compacts and agreements (though not always "treaties" requiring the consent of the Senate) are on equal footing with treaties; thus, they, too, are the supreme law of the land and prevail over any state law to the contrary.[36]

---

[34] U.S. Const. Art. VI, cl. 2; *Martin v. Hunter's Lessee*, 14 U.S. (1 Wheat.) 304, 360, 4 L.Ed. 97 (1816); *Foster & Elam v. Neilson*, 27 U.S. (2 Pet.) 253, 314-315, 7 L.Ed. 415 (1829); *Missouri v. Holland*, 252 U.S. 416, 433, 40 S.Ct. 382, 383, 64 L.Ed. 641 (1920).

[35] *Missouri v. Holland*, 252 U.S. 416, 40 S.Ct. 382, 64 L.Ed. 641 (1920).

[36] *United States v. Belmont*, 301 U.S. 324, 57 S. Ct. 758, 81 L.Ed. 1134 (1937); *United States v. County of Arlington*, 669 F.2d 925 (4th Cir. 1982).

The "Agreement Between the United States of America and the United Mexican States on Cooperation for the Protection and Improvement of the Environment in the Border Area" and Annex III thereto were made as a "sole executive agreement", i.e., an agreement reached by the President with a foreign country that is not specifically authorized by an Act of Congress.[37] Such agreements have the status of a law of the United States and, thus, take supremacy over state law if they are within the executive authority of the President and self-executing. *United States v. Belmont, supra; United States v. Pink*, 315 U.S. 203, 62 S.Ct. 552, 86 L.Ed 796 (1942); *Weinberger v. Rossi*, 456 U.S. 25, 102 S.Ct. 1510, 71 L.Ed.2d 715 (1982); *Dames and Moore v. Regan*, 453 U.S. 654, 101 S.Ct. 2922, 69 L.Ed.2d 918 (1981).

The Agreement is valid because it was made pursuant to a power of the President. *See United States v. Guy W. Capps, Inc.*, 204 F.2d 655 (4th Cir. 1953), *aff'd on other grounds*, 348 U.S. 296 (1955). A number of statutes delegate to the President or the executive branch authority to control the borders of the United States and to regulate the movement of hazardous waste; these grants of authority demonstrate that Annex III falls within the power delegated to the President.[38]

Further, the Agreement is self-executing. The Supreme Court has stated that an international agreement is self-executing if no legislation is required to bring it

---

[37] *See* generally, Restatement (Third) of the Foreign Relations Law of the United States, Section 115, reporter's note 5.

[38] 19 USC § 1202, Schedule 7, Part 13 No. 793.00; 19 USC § 66, 1448, 1624; 42 USC §§ 6921-24; 15 USC § 2612; 42 USC § 6938; and 19 USC § 1351.

into effect.[39] Annex III is clearly intended to be self-executing. It provides that it will enter into force upon an exchange of diplomatic notes indicating that internal procedures have been complied with.[40] This exchange of notes took place on January 29, 1987, bringing Annex III into force. Therefore, the Executive Branch has stated by its exchange of notes that it believes the Annex is effective and in force and Congress has done nothing to contradict this. Therefore, the Agreement is intended to be self-executing.

Additionally the Agreement merely promises to continue existing law. The importation of hazardous waste into the United States is already permitted under U.S. law. Therefore, no additional legislation or rulemaking is required to bring this Agreement into force, and therefore, it is self-executing. All the rules and regulations that are necessary to govern the importation of maquiladora-generated hazardous waste are already in place[41] and no further action is required before the Agreement can go into effect.

Because (1) this Agreement is in an area where the President can act without authorizing legislation and (2)

---

[39] *Cook v. United States*, 288 U.S. 102, 119 (1933); *See also, Islamic Republic of Iran v. The Boeing Company*, 771 F.2d 1279, 1283 (9th Cir. 1985); *cert. dismissed*, 479 U.S. 957, 107 S.Ct. 450, 93 L.Ed.2d 397 (1986).

[40] Annex III at Article XIX.

[41] The tariff laws provide for importation of hazardous waste. 19 USC § 1202, Schedule 7, Section 13, No. 793.00. Moreover, the customs procedures to regulate imports are in place, as discussed above. The United States already has regulations in place specifically to govern the importation of hazardous waste. 40 CFR § 262.60.

all necessary rules and regulations are already in place, this Agreement should be treated as self-executing and a law of the United States taking supremacy over contrary state laws. It cannot be subjected to curtailment or limitation by any state.

Annex III, Article XI to the Agreement provides that "hazardous waste generated in the process of economic production, manufacturing, processing or repair, for which raw materials were utilized and temporarily admitted, *shall continue to be readmitted by the country of origin of the raw materials in accordance with applicable national policies, laws and regulations.*" (emphasis added) The Inland and Trico wastes which Chemical Waste plans to receive and handle are wastes generated in the process of economic production, manufacturing, processing or repair, for which raw materials were utilized and temporarily admitted into Mexico.[42] Thus, pursuant to this Agreement, the Inland and Trico wastes *must be readmitted to the United States*. An interpretation that the Agreement means that Maquiladora wastes must be returned to the United States is compatible with the federal law and regulations which provide for the importation of foreign wastes.[43] It is also the only reasonable and logical interpretation which can be given to Article XI.[44] The Secretary contends that because Louisiana has an authorized

---

[42] Stipulation Nos. 23 and 24; R. 158-159.

[43] *See* footnote 38; 45 Fed. Reg. 33140, 33144 (May 19, 1980); 40 CFR 262.60 (1989).

[44] The provisions of a treaty are to be given a reasonable interpretation, one that will effectuate the obvious purpose of the contracting powers. *Asakura v. Seattle*, 265 U.S. 332, 68 L.Ed. 1041, 44 S.Ct. 515 (1924).

program that the wastes can only be returned in accordance with Louisiana laws, policies and regulations which in fact would prohibit the movement of the waste into Louisiana for treatment, storage and disposal. However, such an interpretation would allow any one state to thwart the effect of the Agreement and render Article XI meaningless. Further, although Louisiana is authorized to administer a hazardous waste regulatory program pursuant to RCRA, a subsequently enacted executive agreement which modifies the regulatory requirements prevails in the case of a conflict.

The EPA authorized Louisiana to administer a state hazardous waste program in Louisiana in 1985.[45] The effect of this authorization is to allow the State to implement a hazardous waste program in lieu of certain portions of RCRA. The authorization by EPA was subsequent to the enactment and amendment of the Louisiana statutes. In 1986, Annex III of the Agreement was promulgated; Annex III is inconsistent with La.R.S. 30:2190. La.R.S. 30:2190 prohibits the importation of hazardous waste from foreign nations; whereas, the Agreement specifically provides for the importation of waste from Mexico and, indeed, requires that Maquiladora waste be returned to the U.S. Even if the Louisiana statutes are placed on the same footing as federal law, to the extent that these two laws are in conflict, the law latest in time of enactment shall prevail. Thus, the Agreement would prevail. *Whitney v. Robertson*, 124 U.S. 190, 193, 194, 8 S.Ct. 456, 457, 31 L.Ed 386 (1988). *See also Reid v. Covert*, 354 U.S. 1, 18, 77 S.Ct. 1222, 1231, 1 L.Ed.2d 1148 (1957).

---

[45] Stipulation No. 21; R. 157.

In summary, the U.S.-Mexican Agreement is the supreme law of the land and cannot be subjected to limitation by any state. Annex III requires the readmittance of Maquiladora wastes by the United States. Pursuant to this international agreement, the Inland and Trico wastes must be readmitted to the United States. The State of Louisiana cannot prohibit what the Agreement mandates. Annex III is the latest expression of national policies, laws and regulations. Because La.R.S. 30:2190 and 2191 prohibit the importation of hazardous waste generated outside of the United States and thus would prohibit the receipt of the Inland and Trico wastes in direct contravention of the United States-Mexico Agreement, they are unconstitutional.

CONCLUSION

No cloud of uncertainty hangs above the issues presented by Petitioner. These questions are easily answered by application of this Court's prior jurisprudence concerning the Commerce Clause and Supremacy Clause of the United States Constitution. Hazardous waste is an article of commerce whether it is generated within or outside U.S. borders. Because La.R.S. 30:2190 and 2191 prohibit without exception the movement of such commerce, they are violative of both the Foreign and Interstate Commerce Clauses under the well-established reasoning espoused by this Court. Further, Congress has not authorized Louisiana to impermissibly burden interstate and foreign commerce and RCRA certainly does not evince an unmistakable and unambiguous intent on the part of Congress to do so. Finally, although we respectfully submit this court should not consider the issue,

La.R.S. 30:2190 and 2191 conflict with an executive agreement and are therefore violative of the Supremacy Clause.

Respondent agrees with Petitioner that the mandate of RCRA should be followed. However, apparently forsaking the isolationism urged by Petitioner, Congress has expressly provided for, through RCRA, the importation of hazardous waste from foreign countries as well as for the exportation of hazardous waste to foreign countries. Moveover, the hazardous waste at issue in this particular case is generated by U.S. companies albeit outside the U.S. borders.

For these reasons, Chemical Waste respectfully submits that the State's Petition for Writ of Certiorari be denied.

Respectfully submitted,

SCHWAB & WALTER
10636 Linkwood Court
Baton Rouge, LA 70810
Telephone: (504) 767-1460

GERALD L. WALTER, JR.
ANNE J. CROCHET